BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DWANE P. SPIES Claimant	)	
VS.	)	Docket No. 1,011,551
CESSNA AIRCRAFT CO. Self-Insured Respondent	)	

ORDER

Claimant requests review of the August 26, 2003 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the claimant did not meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment and therefore benefits were denied.

The claimant requests review and argues he suffered repetitive injuries to his right shoulder and elbow each and every day worked from August 2001 through his last day of employment in September 2002.

Respondent argues claimant suffered a non-occupational accident which was the cause for his medical treatment for his right shoulder and elbow. Consequently, respondent contends claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board affirms the ALJ's Order.

Claimant filled out an injury report for respondent which noted that he suffered a swollen right elbow from drilling and shooting rivets at work. On August 9, 2001, claimant received treatment at respondent's plant medical facility. He was provided an elbow brace as well as a heat lotion to apply to his elbow. After that date the claimant never requested nor received any additional treatment for his elbow.

Claimant continued to perform his job working a 4-day week, 10 hours a day work shift. On September 30, 2002, claimant called and told his supervisor that he was unable to work that day. He explained that he had hurt his arm throwing a football and his shoulder and elbow hurt so bad he was unable to work.

Claimant sought medical treatment with Dr. Andrew M. Barclay and advised the doctor that his arm pain was severe after playing football. Claimant applied for non-occupational short-term disability and when he talked to the representatives from the insurance carrier for that policy he told them he had hurt his shoulder and elbow playing football. He did not allege he injured his shoulder and elbow at work.

Claimant received the short-term disability benefits. Dr. Barclay referred claimant to Dr. Daniel J. Prohaska who ultimately performed surgery on claimant's right shoulder as well as his right elbow. The claimant's history of injury provided to Dr. Prohaska described right shoulder and elbow pain from throwing a football. Claimant gave that same history to the physical therapist.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

After receiving treatment at the respondent's plant medical facility on one occasion for his right elbow complaints, the claimant neither requested nor received additional medical treatment for his right upper extremity due to work-related complaints. Over a year later the claimant called and told his supervisor that he was unable to work because of right shoulder and elbow pain due to playing football. Claimant then received treatment for that condition and consistently provided a history of injury from playing football. And claimant provided that same history to obtain non-occupational short-term disability benefits. The

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[1] K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766,771, 955 P.2d 1315 (1997).

[4] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

injury from throwing the football neither arose out of nor in the course of employment. The Board affirms the ALJ's determination that claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated August 26, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2003.

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Edward D. Heath Jr., Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director